Supreme Court, U.S.
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No. 99-720

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CGU INSURANCE COMPANY OF CANADA, AS SUCCESSOR TO GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA

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QUESTION PRESENTED

Should an unsuccessful appellant be permitted to bring an *Erie*[1] violation claim before this Court on petition for certiorari merely because that losing party disagrees with the manner in which a federal court of appeals applied the acknowledged authority of a state's highest court to the particular facts of the appellant's case, — particularly where the facts of the case support the outcome reached by the federal court?

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1. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938).

LIST OF PARTIES

Prudential Assurance Company Limited (Canadian Branch) was taken over by The Prudential Assurance Company of England Property Casualty, later renamed General Accident Indemnity Company which later became General Accident Assurance Company of Canada, which later merged with Commercial Union Assurance Company of Canada to become CGU Insurance Company of Canada; Continental Insurance Company; Certain Underwriters at Lloyd's Of London; The Home Insurance Company; Commercial Union Assurance Company of Canada Limited, which has since been merged with General Accident Assurance Company of Canada to become CGU Insurance.

RULE 29.6 STATEMENT

Respondent, The Prudential Assurance Company Limited (Canadian Branch), taken over by The Prudential Assurance Company of England Property Casualty, later renamed General Accident Indemnity Company, which later became General Accident Assurance Company of Canada, which later merged with Commercial Union Assurance Company of Canada to become CGU Insurance Company of Canada, is a corporation organized and existing under the laws of Canada. No publicly held company owns 10% or more of the stock of CGU Insurance Company of Canada.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 31, 1999 and Alcan's Petition for Rehearing En Banc was denied on June 24, 1999. On September 13, 1999, the Honorable Justice O'Conner extended Alcan's time to file a petition for writ of certiorari up to and including October 22, 1999. Alcan filed its petition for writ of certiorari on October 22, 1999, and the matter was placed on the docket on October 27, 1999. Alcan asserts jurisdiction in this Court based upon 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. X

Cal. Civil Code § 3287(a)

STATEMENT OF THE CASE

Petitioner, Alcan Aluminum Corporation ("Alcan") brought the present action to recover defense costs and indemnity expenses arising in connection with two underlying proceedings involving injury allegedly caused by hazardous materials deposited by Alcan at the Stringfellow Acid Pits in Riverside County, California. From 1965 to 1972, the Stringellow Hazardous Waste Disposal Site ("the Site") in Riverside County, was an area used for treatment and disposal of hazardous substances. (JR-83; CR-227 at 2:2.[2]) During this period, Alcan disposed of waste at the Site. (JR-84; CR-227 at 3:5.)

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2. All cites to "JR" and "CR" are to the appellate record that was before the Ninth Circuit.

On January 17, 1995, Alcan filed its First Amended Complaint against certain of its insurers, including General Accident, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. (JR-99; CR-227, at 18:39.) Thereafter General Accident was permitted to amend its answer to assert counterclaims against Alcan and cross-claims against Commercial Union[3] for declaratory relief, and equitable contribution and apportionment. (CR- 90 and CR-95.)

In July and August 1996, the parties filed motions for summary judgment/adjudication. (CR-158-159, 167-168, 172, 180, 184, and 190.) On September 23, 1996, the District Court issued a series of separate Orders in this case. In its Order Granting in Part and Denying in Part Defendant General Accident Indemnity's Motion for Partial Summary Judgment ("Order No. 1"), the District Court ordered that Alcan should bear a portion of indemnity and defense costs allocable to its self-insured period incurred by Alcan in *United States v. Stringfellow*, a CERCLA action ("*Stringellow*"), and in *Newman v. Stringfellow*, a toxic tort action ("*Newman*") (*See generally*, JR-147-165; CR-232.) (JR-160; CR-232, at 14.)[4]

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3. Notably, Alcan had refrained from suing Commercial Union and, instead, entered into a pre-litigation settlement with Commercial Union for $750,000 (Can.). It was undisputed below that $500,000 (Can.) of that amount was then reimbursed to Commercial Union by Alcan Limited pursuant to its obligations as the reinsurer for the years from 1975-1979 when Commercial Union merely acted as a "fronting insurer" for the entire Alcan family of companies. (*See* pp.7-8, *infra.*) Thus, in practical effect, Alcan has been self-insured at a primary level for the first $1 million of exposure since August 1975.

4. In a separate Order, the District Court also granted Commercial Union's Motion for Summary Judgment on the cross-
(Cont'd)

Notably, the district court's summary judgment ruling to permit allocation to Alcan ***did not*** impose any specific allocation scheme or formula for the *Stringfellow* and *Newman* actions. Indeed, the district court denied that portion of General Accidents Motion for Summary Judgment, finding potential triable issues of fact with regard to how the allocation should be done. (*See* Order Granting in Part and Denying in Part General Accident's Motion for Partial Summary Judgment, filed 9/23/96, at JR-162: 8-16.) The district court deferred that issue for trial.

To enable the Court to enter a final judgment in this case, Alcan and the Insurer Defendants subsequently entered into a series of stipulations ("Additional Stipulations") which resolved various factual disputes, including the appropriate allocation formula and the amounts of indemnity and defense costs. (CR-243, 244-245; JR-82, 105, and 119.) The additional Stipulations were considered and accepted by the District Court and were specifically incorporated into its Amended Findings of Fact and Conclusions of Law. (CR-276; JR-68.)

With regard to the allocation formula, the parties stipulated amongst themselves that allocation to self-insured periods "**shall be calculated based on the proportionate amount of time Alcan was self-insured.**" (*See* Second Statement of Stipulated Facts, at ¶10, JR-112:27-113:5.) The only *caveat* to this agreement was the insurers' having

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(Cont'd)
claims brought by General Accident based upon the pollution exclusion contained in Commercial Union's policy and the settlement agreement entered into between Commercial Union and Alcan. Commercial Union therefore was not a party to the subsequent trial proceedings. (CR-235.)

reserved the right to argue at trial that they should be completely excluded from having to pay any defense costs or indemnity expenses associated with *Newman* plaintiffs who had never lived in the vicinity of the Stringfellow site until after their respective policy periods had expired. (*Id.* at ¶ 12, JR-113:20-114:18.)

Because of the parties' stipulation, the district court never was called upon to decide on the appropriateness of any particular formula for allocation, except as respects the *Newman* plaintiff "move-on dates." Likewise, the parties' stipulation eliminated the need for any party to put on evidence regarding how any allocations should be made.

Instead, the Stipulations presented three issues of law for resolution by the district court which also formed the principal issues in the appeal and cross-appeals to the Ninth Circuit. These issues were tried by the court on May 5, 1997. Following extended oral argument, the District Court issued oral rulings from the bench which were memorialized in the reporter's transcript of the proceedings (*See* Supplemental Excerpt of Record (hereinafter "SER") SER-159-237; CR-280), in the Amended Findings of Fact and Conclusions of Law (CR-276; JR-66), and in the Amended Judgment (CR-278; JR-46). Cross-appeals followed.

Even before cross-appeals were fully briefed, the California Supreme Court rendered its decision in *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38 (1997). Accordingly, the parties had a full opportunity to brief and argue the case to the Ninth Circuit court. Contrary to Alcan's expectation, *Aerojet* held that allocation to an insured can be permissible.

Acting with the benefit of *Aerojet,* the United States Court of Appeals for the Ninth Circuit ruled on the cross-appeals on March 31, 1999. Alcan was unhappy with the outcome and therefore sought Petition for Rehearing En Banc, which was denied on June 24, 1999. On September 13, 1999, the Honorable Justice O'Conner extended Alcan's time to file a petition for writ of certiorari up to and including October 22, 1999. Alcan filed its petition for writ of certiorari on October 22, 1999, and the matter was placed on the docket on October 27, 1999.

REASONS FOR DENYING THE WRIT

I. CONTRARY TO ALCAN'S PETITION, THE NINTH CIRCUIT PROPERLY APPLIED CALIFORNIA LAW AND DID NOT VIOLATE THE *ERIE*[5] DOCTRINE.

A. The Ninth Circuit Expressly Followed The State's Law Permitting Allocation To An Insured, As Set Forth In *Aerojet*[6]

Alcan's entire Petition for Writ of Certiorari is based upon the false premise that the Ninth Circuit was ignoring the California Supreme Court's precedent, set forth in *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38 (1997), when the Ninth Circuit ruled against Alcan's appeal. On the contrary, the Ninth Circuit's opinion makes clear that it was applying *Aerojet* to the particular facts in this case when it ruled against Alcan. Alcan is simply unwilling to recognize that the facts in this case

5. *Erie R.R. Co. v. Tomkins, supra*, 304 U.S. 64 (1938).

6. *Aerojet-General Corporation v. Transport Indemnity Company*, supra, 17 Cal.4th 38 (1997).

(as well as the stipulations that Alcan agreed to in this case) are different from those present in *Aerojet*. The result reached by the Ninth Circuit was fully appropriate and consistent with the precedent created by *Aerojet*. Thus, this case does not implicate the *Erie* Doctrine at all since, at most, it is a dispute between Alcan and the Ninth Circuit over the intended meanings of *Aerojet*, rather than whether the *Aerojet* decision represents controlling precedent for California.

1. *Aerojet Allows For Allocation To An Insured For Those Triggering Injuries That Occurred Outside Its Period Of Insurance.*

In *Aerojet*, the California Supreme Court plainly has held that defense costs *can* be allocated to the insured for a claim or a part of a claim that is not even potentially covered by an insurer's policy of insurance. (*Aerojet-General Corp. v. Transport Indemnity Corp.* 948 P.2d 909; 928; 17 Cal.4th 38, 69.) There the court noted that for a "mixed" claim, in which at least one of the parts is potentially covered and at least one of the parts is not, the insurer does not have a contractual duty to defend the claim in its entirety, and therefore may be entitled to seek an appropriate reallocation to the insured for some of those costs. (*Aerojet-General Corp. v. Transport Indemnity Corp.* 948 P.2d 909, 921.)

> It follows that, pursuant to quasi-contract, defense costs that can be allocated solely to a claim, or a part of a claim, that is not even potentially covered can be allocated to the insured.

(*Aerojet-General Corp. v. Transport Indemnity Corp.* 948 P.2d 909; 928.)

The court then decided that on the issue of allocation of defense costs to the insured, the insurer must carry the burden of proof and it must do so by the preponderance of the evidence. (*Ibid.*)

> [I]f [the insurer] carries the burden of proof by a preponderance of the evidence, each insurer may allocate defense costs to Aerojet for any part of the single broad "mixed" claim presented in the governmental and private actions that was not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods. . . .

(*Aerojet-General Corp. v. Transport Indemnity Corp.* 948 P.2d 909, 929.)

In the instant case, the evidence supported partial allocation of the *Stringfellow* defense and indemnity expense to Alcan. Furthermore, as set forth *infra*, Alcan is ignoring its own stipulated agreement that any allocation for the *Stringfellow* federal clean up action should be "calculated based on the proportionate amount of time Alcan was self-insured. . . ."[7]

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7. *See* Second Statement of Stipulated Facts, ¶ 10:2-5 at JR-113.

2. *The Ninth Circuit Affirmed The Trial Court's Allocation To Alcan Based Upon Triggering Injuries That Occurred Beyond Alcan's Period Of Insurance.*

The Ninth Circuit opinion acknowledged that, under *Aerojet*, an insurer may allocate to the insured any defense costs for triggering injuries that occurred beyond an insurer's policy period. The insurer whose policy is triggered "may still allocate costs to the insured that are attributable to triggering injuries occurring before or after the effective dates of the insured's policies." (*See* opinion at A-5; citing *Aerojet-General, supra*, 17 Cal 4th 38, 71.)

The Ninth Circuit then concluded that the district court had not erred when it concluded that a share of the defense and indemnity costs arising from the *Stringfellow* and *Newman* actions must be allocated to Alcan. The Ninth Circuit found that allocation to Alcan was appropriate for those triggering injuries that occurred after the insurers' policies had expired for which they could not be held liable. (*See* opinion at A-6.)

> The district court did not err when it concluded that Alcan would be responsible for those costs arising out of the Stringfellow and Newman actions attributable to injuries occurring during Alcan's period of self-insurance.

(*Ibid.*)

Here, the record before the Ninth Circuit amply supported this conclusion. First, the parties had stipulated prior to the district court's ruling on allocation that the

injuries alleged in the *Stringfellow* and *Newman* actions had been continuous through Alcan's period of "self-insurance." (*See* Pre-Trial Conference Order, filed 9/18/95, at ¶5E, Supplemental Excerpts of Record (SER) pp. 000020:28-21:2.) Second, the district court's summary judgment ruling to permit allocation to Alcan ***did not*** impose any specific allocation scheme or formula for the *Stringfellow* and *Newman* actions. Indeed, the district court denied that portion of General Accidents Motion for Summary Judgment, finding that potential triable issues of fact existed with regard to how the allocation should be done. (*See* Order Granting in Part and Denying in Part General Accident's Motion for Partial Summary Judgment, filed 9/23/96, at JR-162: 8-16.) The district court deferred that issue for trial. Third, before the issue could be adjudicated at trial, the parties stipulated amongst themselves that allocation to self-insured periods **"shall be calculated based on the proportionate amount of time Alcan was self-insured."** (*See* Second Statement of Stipulated Facts, at ¶10, JR-112:27-113:5.) The only *caveat* to this agreement was the *insurers'* having reserved the right to argue at trial that they should be completely excluded from having to pay any defense costs or indemnity expenses associated with *Newman* plaintiffs who had never lived in the vicinity of the *Stringfellow* site until after their respective policy periods had expired. (*Id.* at ¶ 12, JR-113:20-114:18.)

Because of the parties' stipulation, the district court never was called upon to decide on the appropriateness of any particular formula for allocation for the *Stringfellow* costs. Likewise, the parties' stipulation eliminated the need for any party to put on evidence regarding how the allocation should be made.

Faced with this record, the Ninth Circuit had no basis to overturn this aspect the district court's judgment. The issue,

as framed by the parties for determination by the Ninth Circuit, was whether allocation to an insured of such costs could ever be permissible. Here, the Ninth Circuit court simply followed *Aerojet's* holding that there could be allocation. As for the formula to be used for allocation, that issue had already been agreed to by the parties and was therefore not subject to appellate review.

The rules of appellate review do not permit a party like Alcan to first stipulate to the appropriateness of a formula at trial and later claim error because the court accepted the stipulation. (*See Mendoza v. Black*, 27 F.3d 1357, 1360.) Likewise, the rules of appellate review do not permit a party to claim error on matters that the lower court was never called upon to decide. (*Hormel v. Helvering*, 312 U.S. 552, 556 (1941).) Once the California Supreme Court had decided the legal issue in *Aerojet* of whether allocation to an insured for defense costs was ever permissible, Alcan's stipulation that injuries had occurred during its period of "self-insurance" and its stipulation to permit allocation based upon the time on the risk, eliminated its right to raise these claims of error on appeal.

B. Alcan's Dispute With The Ninth Circuit Does Not Implicate The *Erie* Doctrine Since It Involves, At Most, Disagreement Over The Intended Meaning Of *Aerojet*, Not Whether *Aerojet* Is Controlling Precedent For California.

The Ninth Circuit's opinion in this case was expressly based on its application of the California Supreme Court's decision in *Aerojet* to the facts in the present case. Nevertheless, because Alcan is dissatisfied with the outcome, Alcan is attempting to manufacture an issue of constitutional

dimension, where none truly exists, in a "last ditch" attempt to get the outcome overturned. In reality, there is no *Erie* Doctrine aspect to this case. This is nothing more than a case where Alcan disagrees with the Ninth Circuit's interpretation of the *Aerojet* decision and is literally now trying to make a federal case out of that disagreement. In like manner Alcan challenges the Ninth Circuit's interpretation of California Civil Code section 3287, governing the circumstances in which a party may recover prejudgment interest. The *Erie* doctrine has never been intended for such circumstances where the federal court is, in fact, applying the law of the state where the diversity action originates, rather than federal law. For this reason also, Alcan's petition should be rejected.

II. THE MANUSCRIPT POLICIES CREATED BY ALCAN IN THIS CASE COMPEL A RESULT DIFFERENT FROM *AEROJET*, WHICH WAS BASED UPON A REVIEW OF "STANDARD COMPREHENSIVE OR COMMERCIAL GENERAL LIABILITY POLICIES" DRAFTED BY THE INSURANCE CARRIERS THEMSELVES.

The *Aerojet* decision is further distinguishable on its facts because the instant case involves manuscript policies, drafted by Alcan, rather than the standard comprehensive general liability policy forms which were the subject of the Supreme Court's discussion in *Aerojet*. Here, the language of the General Accident policies drafted by Alcan do not require General Accident to pay for defense or indemnity suffered beyond its policy periods.

A. The Plain Language Of The General Accident Policies, Written By Alcan, Does Not Require General Accident To Pay For Either Indemnity Or Defense Alleged To Have Been Suffered Beyond Its Last Policy Period.

The Supreme Court in *Aerojet* makes clear that its decision is based upon interpretation of the "standard comprehensive or commercial general liability insurance policies" created by the insurance industry itself. The *Aerojet* decision makes such references no less than seven different times throughout its decision. (*See Aerojet* at pp. 45, 46, 55, 56, 57, 69 and 74, fn. 24.) Indeed, the Court framed the issues to be resolved in the decision as follows:

> Whether, under standard comprehensive or commercial general liability insurance policies, site investigation expenses may constitute defense costs that the insurer must incur in fulfilling its duty to defend, *and whether, under such policies, defense costs may be allocated to the insured.*

(*Id.* at pp. 55-56.) Furthermore, at fn. 24 of the *Aerojet* decision, the Court noted that its result might be different if it had not been reviewing the "standard comprehensive or commercial general liability policy . . ." (*Id.* at p. 74, fn. 24)

The California Supreme Court's holdings on the allocation issue were premised upon application of a "contractual/quasi contractual analysis" of the standard comprehensive or commercial liability policy. (*Id.* at p. 73.) Applying that same "contractual/quasi contractual analysis" to the policies manuscripted by Alcan compels finding in favor of General Accident. Here, the language of the policies

written by Alcan does not require General Accident to pay for indemnity or defense alleged to have been suffered beyond its last policy period. Instead, the contract only requires General Accident to pay all sums which the insured shall become legally obligated to pay by reason of the insured's legal liability for damages on account of bodily injury or damage to or destruction of property "suffered or alleged to have been suffered within the policy period or any renewal thereof . . ." (SER-97; SER-139.)

On its face, this language limits General Accident's potential for coverage to damages "suffered or alleged to have been suffered within the policy period or any renewal thereof." If the manuscript language is interpreted according to its plain and ordinary meaning, General Accident is not be required to pay indemnity for any damages suffered or alleged to have been suffered beyond its last policy period.

Likewise, with regard to the duty to defend, the policy manuscripted by Alcan only requires General Accident to "defend in the name of and on behalf of the Insured any civil action which at any time may be brought against the Insured for injuries or damages or alleged injury or damages *covered under this policy*." (SER-97; SER-139.) (Emphasis added.) Thus, here too, interpreting the manuscript contract according to its plain and ordinary meaning, General Accident should not be required to pay for defense costs for damages suffered beyond its policy period since the contract does not require indemnification for any damages beyond General Accident's last policy period.

B. Any Perceived Ambiguity In The Language Must Be Interpreted Against Alcan, As Drafter Of The Manuscript Policies.

Furthermore, to the extent the Court believed any of the language used in the manuscript policies is ambiguous, the language must be interpreted against Alcan in its capacity as drafter of the manuscript policies. (California Civ. Code § 154.)

Accordingly, allocation by the District Court to Alcan's self-insured periods was appropriate under the particular language of the General Accident policies written by Alcan Since the *Aerojet* decision involved standard adhesion policy forms written by the insurance industry, this is yet another reason why a different result is appropriate in our case.

III. THIS DECISION HAS NO IMPORTANCE WHATSOEVER BEYOND ALCAN'S MONETARY SELF-INTEREST.

Can there be any doubt that this case fails to meet every threshold of significance for cases accepted by this Court? The Ninth Circuit's decision breaks no new ground and involves no true questions of constitutional dimension. (Supreme Court Rule 10.) Furthermore, the decision has no impact whatsoever as precedent on anyone other than the parties to this case because the Ninth Circuit recognized that this case was appropriate for routine disposition, and did not certify the opinion for publication. This petition is being brought to serve Alcan's monetary self-interest, nothing more. Taking this case would be an utter waste of this Court's precious time and resources, and for that reason alone, the petition should be denied.

CONCLUSION

For all the above reasons, respondent respectfully requests that Alcan's Petition for Certiorari be denied in all respects.

Respectfully submitted,

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